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No. 04-81

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Respondents have submitted a supplemental brief with an unwieldy title,[1] which they contend is "in opposition to" petitioner BASF Corporation's amicus brief in *Bates* v. *Dow Agrosciences LLC*, No. 03-388. In fact, respondents' ten-page brief almost totally ignores the substance of the amicus brief. Instead, respondents use BASF's proper amicus filing in another case as an excuse to submit a thinly-disguised sur-reply opposing the *Peterson* petition. Although we are reluctant to burden the Court with additional reading material, we think it important to respond briefly to the most significant of the many unfounded assertions in respondents' filing. BASF therefore submits this supplemental brief pursuant to Supreme Court Rule 15.8.

ARGUMENT

I. BASF'S AMICUS FILING IN *BATES* WAS PROPER

As this Court well knows, *Bates* presents important issues regarding the scope of preemption under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). As a significant manufacturer of agricultural chemicals, BASF filed an amicus brief in *Bates* to provide the Court with its perspective on some of those issues. Appropriately, BASF disclosed in the "Interest of the Amicus" section that it had pending a petition that could be affected by the Court's decision in *Bates*. It also briefly discussed the Minnesota Supreme Court's published decision in *Peterson* (along with

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[1] Respondents title their brief "Respondent Farmers' Supplemental Brief Addressing Petitioner BASF's Amicus Brief in Bates v. Dow Agrosciences (No. 03-388) Improperly Arguing Merits of Petition for a Writ in BASF v. Peterson (No. 04-81) Without Notifying Farmers' Counsel and Incredulously Complaining that Peterson Jury's 'Fraudulent Marketing' Verdict Requires BASF to Change Product Labels" ("Supp. Br.").

some 30 other cases) to illustrate the wide variety of state-law damages actions that can implicate pesticide labeling.

Respondents are not parties in *Bates* and have never sought leave to appear in that case. Accordingly, BASF was not obliged to serve them with its amicus brief. See Sup. Ct. Rule 29.3. Had they been served with the brief in *Bates*, moreover, respondents would have had no opportunity to respond to it, because the period for filing amicus briefs supporting petitioners expired *before* BASF submitted its amicus brief supporting respondent. See Sup. Ct. Rule 37.3(a). There is thus no substance to respondents' bizarre accusation (Supp. Br. 2) that BASF engaged in unfair tactics in failing to serve them with its amicus brief.

Moreover, BASF did not argue in its *Bates* amicus brief that the petition in *this* case should be granted. Having no such scruples themselves, respondents argue in their supposedly responsive filing that the Court should "promptly deny BASF's petition as frivolous." Supp. Br. 1.[2] As we discuss below, however, respondents' filing should persuade the Court to *grant* the petition. Respondents' blatant mischaracterization of their claims demonstrates the need for a strong statement from this Court that state-law actions – in whatever

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[2] This is not the first time that respondents have tried to get the last word on the merits of the petition through an unusual filing: they submitted a 14-page opposition to the three amicus briefs filed in support of the petition in this case. See Respondents (Farmers) Consolidated Objection to Motions For Leave To File Amicus Curiae Briefs By Petitioner's Coordinated Trade And Lobby Groups Who Ignore The Jury's Established Special Verdict Findings And Compelling Evidence of BASF's "System Of Deceit" (filed Oct. 4, 2004). Like respondents' most recent submission, that opposition first asserted a fictive rule violation (*id.* at 1) – stridently accusing three respected national organizations and their counsel of improprieties – and then reiterated respondents' distorted version of the facts of the case.

guise – that at their core seek to impose liability for EPA-sanctioned (or, as in this case, EPA-mandated) pesticide labeling practices are preempted.

II. RESPONDENTS' CLAIM IS BASED ON THEIR CONTENTION THAT BASF'S PESTICIDE LABELING DECEIVED AND EXPLOITED THEM

Respondents contend that they "have never challenged the accuracy or adequacy of the Poast or Poast Plus product labels." Supp. Br. 10. That statement is contradicted irrefutably by the record. Although they insist that their claim is for "fraudulent marketing," their cause of action under the New Jersey Consumer Fraud Act ("NJCFA") always has relied on a claim of deceptive and wrongful labeling.

The complaint alleges straightforwardly that BASF "falsely represented through its labeling * * * that the EPA had not approved Poast Plus for use on minor crops." Compl. ¶ 13. In other written submissions, respondents accused BASF of "'secretly' labeling Poast Plus for only a select few crops."[3] Respondents' counsel emphatically agreed with the trial court's observation that respondents were claiming that BASF's pesticides "were labeled according to the rules and regulations of EPA and that that was part of the manipulation of the system that * * * is the basis of [the] lawsuit." 10/11/01 Hearing Tr. at 111-112.

The contention that BASF's labels were deceptive was a drumbeat during the trial. When asked on direct examination what he hoped to accomplish in this lawsuit, one named plaintiff told the jury:

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[3] Plaintiffs' Consolidated Memorandum Responding to BASF's Motions to Decertify the Class and for Summary Judgment on Plaintiffs' New Jersey Consumer Fraud Act Claims, February 28, 2000, at 29; see also Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Class Certification, January 28, 1999, at 1 ("BASF engaged in * * * secret labeling").

> I'd like to send a message to the industry out there that – that *you shouldn't lie on the label.* You should tell the truth on a label that's on a – with a bottle of herbicide – a jug of herbicide.

Tr. at 1206 (emphasis added). See also, *e.g.*, Tr. 321 ("Q. What does it do to your trust of the accuracy of the label? A. It's not correct."); Tr. 588-589 ("Q. There is nothing on the Poast Plus label that is deceptive or misleading in any way. A. Yes, it is.").

In particular, respondents were aggrieved by BASF's decision to subset label Poast Plus. One respondent stated:

> I felt that we were being deceived by what we found out at that time, what was registered. The crops that were registered for Poast Plus and what was actually put on the label are two different things.

Tr. 1449. Another respondent was asked, "Is there anything on the Poast Plus label that you feel was misleading?" Tr. 1421."Yes," he answered, "[I]in light of the information I know now, that it could have been used on other crops and that the label only says the four crops." *Id.* This testimony refutes respondents' argument (Supp. Br. 4-5) that their claims arose from BASF's pesticide *pricing* and not the labeling: their complaint was that "Poast Plus was half the price of Poast, but *because of that label*, [they weren't] allowed to use Poast Plus." Tr. 1449 (emphasis added).[4]

Respondents also contended that the label was misleading because Poast and Poast Plus were labeled as different prod-

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[4] See also, *e.g.*, Tr. 572-573 ("They registered these two products to spray the same crops, but they chose only to label one of those two for the minor crops."); Tr. 1449 ("Because of that label, I wasn't allowed to use Poast Plus"); Tr. 1421 ("[Poast Plus] could have been used on other crops and * * * the label only says the four crops").

ucts when in fact they were "one product." See Supp. Br. 1 ("a company cannot exploit a federal health and safety process to market *one product* 'for different uses at different prices'") (emphasis added). For example, respondents claimed that BASF intentionally attempted to pass off "identical" pesticides as different products by listing the active ingredients in different units on the EPA-approved labels of its two pesticides. See Tr. 1179-1180. ("[T]his is an attempt to perhaps confuse the farmers"); Tr. 1239 ("I believe they did it to confuse us"). Such statements were not accidents, but were aggressively solicited by respondents' counsel as the legal and emotional core of their case. See, *e.g.*, Tr. 1421 ("Is there anything on the Poast Plus label that you feel was misleading?"); Tr. 1180 ("Do you think that this [labeling active ingredients in different units] would have been done to confuse the farmer?"); Tr. 1239 ("But what were some of the things that you thought were deceptive about the Poast Plus label?").

This record refutes respondents' *post hoc* characterization of their claim, and demonstrates the Minnesota Supreme Court's error in ruling that the claim was not preempted.

III. THIS CASE PRESENTS IMPORTANT ISSUES THAT WILL NOT BE RESOLVED BY THE *BATES* CASE

Finally addressing the *Bates* case at the end of their brief, respondents contend that the question of whether the *Bates* plaintiffs' crop-damage are preempted is "more vexing" (Supp. Br. at 9) than the preemption question presented here. According to respondents, "[a]ll courts agree" that "fraudulent marketing claims" are "[a]bsolutely [n]ever [p]reempted" (*id.* at 10) because they "fully implicate the historic police power of the State to protect innocent consumers from fraud." *Id.* Contrary to that bold yet entirely unsupported statement, however, the NJCFA claim here is even more clearly preempted than the claims in *Bates*.

First, claims such as respondents' strike more directly at the heart of FIFRA's labeling regime than the crop-damage claims at issue in *Bates*. The plaintiffs in *Bates* seek compensation for crop damage under traditional tort theories; such claims would have been available to them if FIFRA and its regulations did not exist. In contrast, respondents' claim here is closely intertwined with FIFRA: they contend that BASF manipulated *the federal labeling scheme* and failed to disclose *the federal registration status* of its products. They also contend that the *federal registration* of Poast Plus for minor crops imposed a duty on BASF to sell Poast Plus to minor crop farmers. Indeed, because the federal regulatory scheme is at the very core of respondents' claims, those claims would not exist without FIFRA. This Court has stated that there is no presumption against preemption of state-law causes of action that depend on federal statutes. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-348 (2001) (finding no presumption against preemption of state-law claim for fraud on the FDA because "the very subject matter of petitioner's statements were dictated by [a federal] statute's provisions").

Second, the petitioners in *Bates* argue that their claims are not preempted because EPA did not substantively review the statements about product efficacy that they contend were flawed. See *Bates* v. *Dow Agrosciences LLC*, No. 03-388, Pet. Br. at 30-37. Here, in contrast, EPA regulations explicitly *mandated* that BASF label Poast and Poast Plus as different products bearing different names (see Pet. 4-5) and affirmatively *authorized* subset labeling (see *id.* at 3) – giving explicit federal approval to the practices for which BASF was found liable under state law.

Respondents argue (Supp. Br. 5-6) that their claims should not be preempted because EPA did not *require* BASF to exclude minor crops from the Poast Plus labeling. That argument misses the point. By virtue of the subset labeling rule, federal law establishes that manufacturers are not

obliged to include all federally-registered uses on product labels. A state-law action that imposes such a requirement therefore is preempted. See *Irving* v. *Mazda Motor Corp.*, 136 F.3d 764, 769 (7th Cir. 1998) (quoting *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)) ("a state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do'").[5]

Third, while the claims in *Bates* were resolved on summary judgment early in the litigation, this case has been fully litigated and tried to a jury verdict. As discussed above, there is no room for doubt here that respondents' claims rest on attacking BASF's pesticide labeling. Accordingly, this case provides an unusually good vehicle for this Court to describe the proper scope of FIFRA preemption in a state-law damages action.

Moreover, the particular issue presented by this case is important to the entire agricultural chemicals industry. In light of the decision below, members of this highly regulated industry now face the prospect that using labeling practices that have been mandated or authorized by federal law may result in liability under state law. Because this conflict be-

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[5] Plaintiffs contend that the judgment below "does not *prohibit* companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or naming one product as different products for sale." Supp. Br. at 1 (emphasis added). Under respondents' theory, however, companies that do employ subset labeling or sell different pesticide products having the same active ingredient – in full compliance with FIFRA – risk having to pay damages under state consumer fraud statutes. Such damages claims are preempted. See *Cippolone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy").

tween federal and state law is insupportable, this Court's intervention is urgently needed.

IV. THE FIRST AMENDMENT ISSUE PRESENTED MERITS REVIEW

Of course, unlike *Bates*, this case also presents an important First Amendment issue. In none of their three filings have respondents disputed that the jury was invited to hold BASF liable, in part, on the basis of truthful statements to regulatory authorities and truthful statements in a magazine article on matters of public importance. Because the Minnesota Supreme Court's decision threatens severely to inhibit corporate speech, a grant of certiorari on that issue also is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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